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CHARLES ELMORE CROPLEY

No. 911

IN THE

Supreme Court of the United States

STATE OF TENNESSEE, EX REL.,
PHILIP J. SHERMAN

VS.

O. W. HYMAN, ET AL.

AND

STATE OF TENNESSEE, EX REL.,
JOHN V. AVAKIAN

VS.

O. W. HYMAN, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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To the Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

STATEMENT

These are two suits by former students of the University of Tennessee, College of Medicine, for mandamus to require the College authorities to reinstate them as

students. Under the Tennessee statute such suits are brought in the name of the state on relation of the complaining parties.

Petitioner Philip J. Sherman is an Orthodox Jew, a native-born American citizen and a resident citizen of Chattanooga, Tennessee. The Dean of the College of Medicine, O. W. Hyman, was apparently prejudiced against him because of his race and religion and his age (R. pp. 94-95-96).

Petitioner John V. Avakian is of Armenian parentage, a native-born American citizen and also a resident citizen of Chattanooga, Tennessee. He is an acquaintance, associate and friend of Sherman. While there may be some prejudice against Avakian because of his race, the prejudice shown in the record seems to be because of his association with Sherman (R. pp. 97-98).

The University of Tennessee is a public institution of learning operated by the state and supported by public funds. It is a land grant college. The College of Medicine is one of two accredited schools in the state. These accredited medical schools have the highest curriculum of any medical schools in the country. The College of Medicine is affiliated with other accredited medical schools of this country in an association which requires that no medical college accept a student who has been discharged from another college (R. pp. 8, 18, 92).

No one can practice medicine in Tennessee unless holding a diploma from the University of Tennessee College of Medicine or a medical school of equally strict medical requirements (Tenn. Code, Sec. 6911).

Petitioners, Sherman and Avakian, after completing pre-medical education, were accepted as medical students at the University of Tennessee College of Medicine and had completed the sixth quarter (second year, one-half medical course) when they were wrongfully expelled for alleged complicity in circulating questions to be asked on a coming mid-term quiz. The expulsion of petitioners constitutes a judgment of attainder against them, making it impossible for them to complete their medical education or to practice their chosen profession in Tennessee (R. pp. 4, 92).

The petitioners were expelled without a trial or hearing recognizable as such or affording them any safeguards. There was no sufficient notice or definite charge. They were not confronted with any witnesses; they were not allowed to hear any evidence against them; they were not allowed to examine or cross-examine the witnesses, or to object to incompetent testimony, or to discredit, disqualify, or impeach witnesses against them, although the witnesses interviewed by the investigating committee were promised immunity from their own guilt if they accused petitioners and others, and threatened with expulsion if they refused to do so (Original Bill, R. pp. 4-5; Stipulation, R. p. 92; Original Bill, Ex. "A", R. p. 10; Original Bill, Ex. "C", R. p. 11, Ex. "D", R. pp. 13, 15, 16, 17, 95, 98; Original Bill, Ex. "D" (1), R. p. 15; Return of Defendants, R. pp. 22, 23; Stipulation, R. p. 92, Ex. 1 to Return, R. pp. 33, 35, 39, 44, 52; Ex. 2 to Return, R. pp. 72, 73, 74).

Petitioners were called before the faculty committee with a presumption of guilt against them, induced by incompetent and hearsay testimony. All petitioners could

do under such circumstances was to deny their guilt. This they did, but were summarily expelled from the College (Ex. 1 to Return, R. pp. 44, 45, 46, 48, 49, 51, 52, 60, 61).

The authority to discipline students at the University of Tennessee is in the Board of Trustees, which acts through committees. Petitioners asked for a hearing before the Trustees and requested that witnesses be produced and sworn and subjected to examination and cross-examination. While replying that they were granting petitioners a hearing, the Trustees, in fact, gave them none. No evidence was produced against petitioners at the so-called hearing before the Trustees; petitioners were not allowed even to hear the hearsay statement of Dean O. W. Hyman, or read the memorandum of facts which the Dean prepared and was said to use to refresh his recollection as to what supposed witnesses were supposed to have said (O. Bill, Ex. "D", R. pp. 15, 16, 17; Ex. 2 to Return, R. pp. 72, 73, 74).

After Dean Hyman, in the absence of petitioners, had made a statement to the Trustees, petitioners were called before the Trustees and offered an opportunity to deny their guilt without hearing or knowing what had been said or done against them in their absence. Petitioners denied their guilt, proved good character and reputation for truth and veracity, honesty and fair dealing. This is all they could do. Petitioners were then excused and Dean Hyman, in their absence, made a further statement. The Trustees then purported to affirm the sentence of expulsion theretofore wrongfully imposed by the faculty committee (O. Bill, Ex. "D", R. pp. 94-97, 97-99).

The petitioners have been deprived of their education and their chosen profession—property—without due process of law. They filed these suits in the Chancery Court of Shelby County, Tennessee, for mandamus to require the College authorities to reinstate them as students. The causes were tried together and one record made in the Chancery Court, and that Court found that petitioners had been wrongfully expelled without due process of law and granted the peremptory writ of mandamus. The defendants, officers, faculty and trustees of the University, appealed from the decree of the Chancery Court to the Supreme Court of Tennessee, where the cases were again jointly heard on one record. The Supreme Court held that petitioners were not entitled to a trial or hearing affording due process of law, and reversed the Chancellor and dismissed the peremptory writ (O. Bill, R. p. 1; Stipulation, R. p. 92; Chancery Decree, R. pp. 76-77; Sup. Ct. Decree, R. pp. 81-90). Sup. Ct. Op., R. pp. 87-88.

II.

REASONS FOR ISSUANCE OF THE WRIT

Petitioners respectfully show that it is the right of every citizen to practice his chosen profession and to qualify himself therefor in the institutions maintained by the state for that purpose. For the State of Tennessee, acting through its state university, to wrongfully deprive a citizen of such rights, without due process of law, or because of personal or racial prejudices, is to abridge the privileges and immunities of a citizen of the United States; and is to deprive such citizen of life, liberty and property without due process of law, and is to deny him the equal protection of the law. Petitioners have been wrongfully deprived of property rights, spe-

cially set up and claimed by them under the constitution, in violation of the constitution of the United States, Amendment XIV. The Supreme Court of Tennessee, which is the highest court of the state, has decided a federal question of substance not heretofore determined by this Court and such decision is not in accord with the decisions of this Court.

Wherefore, your petitioners pray that, as authorized by United States Code Title 28, Section 344 (b), a writ of certiorari issue under the seal of this Court, directed to the Supreme Court of Tennessee, commanding that Court to certify and send to this Court a full and complete transcript of the record and of the proceeding of the said Supreme Court of Tennessee in the cases entitled *State of Tennessee, Ex Rel., Philip J. Sherman vs. O. W. Hyman, et al., and State of Tennessee, Ex Rel., John V. Avakian vs. O. W. Hyman et al.*, to the end that these causes may be reviewed and determined by this Court as provided by the statutes of the United States; and that the judgment therein of the said Supreme Court of Tennessee be reversed by this Court, and petitioners pray for such further relief as this Court may deem proper.

This the 10th day of April, 1943.

PHILIP J. SHERMAN,
JOHN V. AVAKIAN.
By A. L. HEISKELL,
Counsel for Petitioners.

BRIEF

In support of their petition requesting this Court to review by certiorari the proceedings had in these causes, your petitioners call attention to the authorities and legal points herein set forth.

I.

A.

The University of Tennessee is a public corporation, created by statute for the promotion of education in that state, and is supported by public funds; and has accepted Federal Land Grants. It is the head of the State Public School System.

Tenn. Acts, 1939, Ch. 30, Sec. IV;
Tenn. Acts, 1941, Ch. 16, Sec. IV;
Tenn. Code, Sec. 553.

B.

The Statute creating the University provides for the governing of the institution by Trustees, who have authority

> "to elect a president, such professors, tutors, and other officers in said college, as they may judge necessary, and to make such by-laws, rules and regulations for the government of said college, and promotion of education therein, as in their opinion may be expedient or necessary; provided such by-laws, rules and regulations *are not inconsistent with the constitution and laws of the United States and of this state.*"

Ch. 64, Acts of 1807;
Scott's Laws, pages 1047, 1049;
Ch. 78, Acts of 1807;
Scott's Laws, page 1059;

Tenn. Code, Sections 553, et seq.

"The Board (of Trustees) may appoint an executive committee of five members * * *. The Board may appoint such other committees for the transaction of business as it may deem advisable."

Tenn. Code, Sec. 577.

C.

The Trustees, Faculty and Officers of the University of Tennessee (a part of the public school system of the state) act as agents of the state and their acts are within the protection provided by the United States Constitution, Amendment Fourteen.

"The Public schools of the City of Norfolk are under the direct control and supervision of the defendants (school board) whose duty it is to employ teachers and provide for the payment of teachers' salaries . . ."

". . . There can be do doubt but that the fixing of salary schedules for the teachers is action by the state which is subject to the limitations prescribed by the Fourteenth Amendment."

Alston vs. School Board of City of Norfolk, 112 Fed. (2d) 992, 994.

"The constitutional provision therefore, must mean that no agency of the State, or (of) the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, *his act is that of the State.* This must be so, or the constitutional prohibition has

> no meaning. Then the State has clothed one of its agents with power to annul or to evade it."
>
> Ex Parte The Commonwealth of Virginia, 25 L. Ed. 676 at 679; 100 U. S. 339.

No by-laws, rules or regulations governing disciplinary proceedings are pleaded by the respondents; nor does there appear in the statute any authority to proceed otherwise than as indicated above by the committee of the Trustees in a manner "not inconsistent with the Constitution and laws of the United States or of this State."

II.

A.

The constitution which expressly controls the proceedings by the Trustees provides:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the law."
>
> U. S. Constitution, Amendment 14, Section 1.

B.

"Due process of law" requires that no one's life, liberty or property be taken or destroyed except in a proceeding reasonably complying with the requirements of the common law.

These are:

1. Reasonable notice of time and place of the hearing, and opportunity to be heard;

2. The presentation of definite charges against the defendant, beyond which the hearing must not go;

3. The presentation of proof by witnesses under oath;

4. An opportunity to examine and cross-examine witnesses, which presupposes an opportunity of the accused to confront the witnesses, either in person or by counsel;

5. The right to be represented by counsel;

6. The presumption of the innocence of the accused until he is convicted upon competent evidence before a fair and unprejudiced tribunal.

These are fundamental rights which our jurisprudence has always recognized.

> "If any of these are disregarded in the proceeding by which a person is condemned to the loss of life, liberty, or property, then the deprivation has not been by 'due process of law'."
>
> Hurtado vs. People of California, 110 U. S. 536; 28 L. Ed. 239;
>
> 14 Am. Jur. 888, Sec. 176;
>
> Road Impr. Dist. No. 2 vs. Mo. Pac. R. R. 275 Fed. 600;
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> Interstate Commerce Comm. vs. L. & N. R. R. 227 U. S. 88, 93; 57 L. Ed. 431, 434;
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> Morgan vs. U. S., 304 U. S. 18;
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> Richardson vs. Reese, 165 Tenn. 661;
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> Phillips vs. Lewis, 3 Tenn. 230;
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> Hayden vs. Memphis, 100 Tenn. 580, 588; 12 Va. Law Review, p. 647, et seq.;
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> Morley vs. Power, 73 Tenn. 691;
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> Corpus Juris Vo. 70 p. 482, (Witnesses) Sec. 650;
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> People vs. Cole, 43 N. Y., 508; 15 LRA (NS) 494, note;

Cumberland R. Co. vs. Girdner, 192 S. W. (Ky.) 873, 874;
Sperry vs. Est. of Franklin Moore, 4 N. W. (2d) (Mich.) 18;
Thomas vs. Dower, 297 Pac. (Wash.) 1094, 1095;
Aluminum Industries, Inc. vs. Egan, 22 N. E. (2d) (Ohio) 459, 462.

C.

A forfeiture of property rights cannot be adjudged by legislative acts, and confiscations without judicial hearing constituting "due process of law" are in excess of the tribunal's jurisdiction, illegal and void.

U. S. vs. B. & O. Ry. Co., 293 U. S. 454; 55 Sup. Ct. 268;
Chicago, Milwaukee & St. Paul Ry. vs. Minn. 134 U. S. 418;
Southern Ry. vs. Virginia, 290 U. S., 190;
State Board of Medical Examiners vs. Friedman, 150 Tenn. 171;
Connors vs. City of Knoxville, 136 Tenn. 430, 435, 439;
State vs. Del Rio, etc. Co., 131 Tenn. 600, 605;
Ohio Tr. Co. vs. Waechter, 25 Ohio (Circuit Court) 605;
Powell vs. Sammons, 31 Ala. 552.

III.

A.

The right to pursue one's education in a public institution, to pursue one's profession, trade or calling, is a right protected by the Fourteenth Amendment of the United States Constitution.

Butchers' Union, etc. Co. vs. Crescent City, etc. Co., 111 U. S. 746, 28 L. Ed. 585, 589.

"It (the right of attending public schools) is, there-

fore, a right—a legal right—as distinctively so as the vested right in property owned is a legal right, and as such it is protected, and entitled to be protected by all the guaranties by which other legal rights are protected and secured to the possesser."

Gabrielli vs. Knickerbocker, 74 Pac. (2d) (Cal.) 290, 292;
Piper vs. Big Pine School District, 226 Pac. (Cal.) 926, 929;
Johnson vs. Town of Deerfield, 25 Fed. Sup. 918, 921;
State vs. Wilson, 297 S. W. (Mo.) 419, 420;
Jackson vs. State, 57 Neb. 188, 189.

B.

Every citizen has an equal right with every other citizen to pursue his education in the public educational institutions of the state. The right to such education, profession or calling is necessary in the "pursuit of happiness" guaranteed to every citizen; it is a liberty or privilege and a property right which can not be taken from the citizens arbitrarily or unreasonably or except by "due process of law."

"A college can not dismiss a student except on a hearing in accordance with a lawful form of procedure, giving him notice of the charge and an opportunity to hear the testimony against him, to question witnesses, and to rebut the evidence. A student wrongfully dismissed is entitled to reinstatement, since an action for breach of contract would not afford adequate relief."

11 Corpus Juris, 998;
27 R. C. L. 144;
12 Va. Law Review 650;
Gleason vs. State University, 116 N. W. (Minn.) 650;

Commonwealth vs. McCauley, 3 Pac. (C. C.) 77;
Anthony vs. Syracuse University, 223 N. Y. S. 796, 802;
Frank vs. Marquette University, 245 N. W. (Wis.) 125.

C.

Where such property right is taken from the student arbitrarily or unreasonably or otherwise than by due process of law, mandamus will lie to require reinstatement of the right.

Gleason vs. University of Minn. 116, N. W. (Minn.) 650;
Baltimore University vs. Colton, 98, Md. 623; 57 Atl. 14;
Commonwealth vs. McCauley, 3 Pac. (C. C.) 77;
Cross vs. Board of Trustees, etc., 121 Ky. 469;
The King and the Chancellor, Masters, etc., of the Univ. of Cambridge, 2 Lord Raymond's Reports, p. 378;
Jackson vs. State, 57 Nebr. 183, 189;
Whitwell vs. U. S. ex rel. Selden, 58 Fed. (2d) 895;
Gabrielli vs. Knickerbocker, 74 Pac. (2d) 290, 292;
State vs. Wilson, 297 S. W. (Mo.) 419, 421.

IV.

A.

A proceeding to deprive one of his right to pursue his profession is in the nature of a criminal prosecution.

State Board of Medical Examiners vs. Friedman, 150 Tenn. 171.

B.

Depriving one of his profession is a penalty. In a judicial determination of the forfeiture or loss of such prop-

erty rights, the common law safeguards as to a trial must be observed.

State Board of Medical Examiners vs. Friedman, 150 Tenn. 171;
State Board vs. Lewis, 149, Ga. 716, 722;
Hawkins vs. Kercheval, 10 Lea (Tenn.) 535; 12 Va. Law Review, 647, 650;
Stevenson vs. Atl. Real Est. Bod., 139 Atl. p. 11;
Morley vs. Power, 73 Tenn. 691.

ARGUMENT

Petitioners here (relators in the state courts), after finishing their sixth quarter of study, were expelled because they were supposed to have been connected with the theft and sale to other students of questions to be used in a fifth-quarter mid-term quiz later to be given, thus advising the students, in advance of the quiz, the questions to be asked. Petitioners had already successfully passed their work in the fifth-quarter and the questions could not have been used by them to aid them in their studies. The petitioners are accused, therefore, of stealing the quiz questions for the purpose of circulating them for a profit among students of the fifth-quarter. Petitioners were accused of an offense involving dishonesty.

Upon investigation by the University authorities, *other students admitted that they were guilty of obtaining and selling the questions.* These students were promptly and rightly expelled (R. pp. 47, 50).

Petitioners, however, denied their guilt and denied any connection with this dishonest conduct; they demanded a hearing and requested that any accusing witnesses be presented before them in order that petitioners

might hear the testimony against them and have an opportunity to cross-examine the witnesses to test their credibility and to question the relevancy or competency of their testimony. Petitioners were expelled without such a hearing.

Under Section I of the brief, we have cited some of the statutes and cases to show that the University of Tennessee is a public school and part of Tennessee's public school system financed under the general appropriations for the state's educational system. We have cited cases also showing that the Trustees and Officers of the school are, by reason of their public position, the agents of the state and that their acts are the acts of the state within the prohibition of the Fourteenth Amendment against taking property without due process of law. Since the Fourteenth Amendment does prohibit the taking of property without due process of law, we have left only three inquiries: (1) What safeguards are guaranteed to the citizens by the Due Process Clause; (2) were these safeguards afforded petitioners in the proceedings by which they were expelled; and (3) was the right of of petitioners to continue their education to prepare themselves for their chosen profession a property protected by the Due Process Clause as to which mandamus will lie.

With these points in mind, let us look at the uncontradicted facts shown by the record.

Facts

The procedure adopted, as shown by the return to the alternative writ of mandamus filed by the University authorities, was as follows: A student committee under the direction of the respondent Dean O. W. Hyman, was organized to investigate the known theft of the quiz

questions. This student committee, acting as a grand jury, called various students before it and inquired what each might know concerning the questions. The committee promised each witness not to discipline him for the improper use of such questions, if he would tell from whom he obtained them and would co-operate with the committee. If the witness did not accuse those whom Dean Hyman thought the witness should accuse, then the Dean would state that the committee knew that the witness had other information and that he, as Dean, would recommend that the witness be expelled if he did not tell what he knew. In this way the student committee obtained the names of a number of students, some of whom admitted their guilt as stated. Under pressure and threat of expulsion some student witnesses mentioned rumors they had heard and made ex parte and hearsay statements concerning petitioners, Sherman and Avakian. The student committee then called Sherman and Avakian before it, as it did other accused students, and asked them to state what connection they had with the unlawful use of the quiz questions. However, the committee was already prejudiced against petitioners by the incompetent and hearsay evidence already presented to the committee acting as a grand jury. The return of the defendants shows the following:

> "He (Sherman) was told that the committee *had definite information* that he did know something about these questions and told him that if he did not give the committee full co-operation, he would be recommended to the executive committee for dismissal. Sherman denied that he knew anything at all about the matter."
>
> Record, page 44, (Sherman);
> Record, page 52, (Avakian).

The record indicates that the only way Sherman and Avakian could "give the committee full co-operation" would be to admit their guilt as to any charge pressed against them by Dean Hyman.

The student committee then referred the cases of Sherman and Avakian to the executive committee of the faculty of the Medical School (R. pp. 48, 51).

The executive committee of the faculty, of which Dean Hyman was Chairman, without hearing the testimony of the witnesses, relying upon ex parte hearsay statements of the dean, expelled petitioners without their having any opportunity to see the accusing witnesses, to hear their testimony, to cross-examine them, or to impeach them or contradict them in any way other than to simply deny their own guilt.

The manner in which petitioners had been expelled was by them brought to the attention of the Board of Trustees (the governing body) of the University. According to the return filed by the defendants, "The Board of Trustees directed President Hoskins to meet with the executive committee in conference and *to rehear the testimony* bearing on Messrs. Sherman and Avakian." (Exhibit 1 to return of defendants, R. p. 65). But when President Hoskins met with the executive committee *they did not rehear the testimony*. On the contrary, they followed the same old procedure of allowing Dean Hyman, in the absence of petitioners, to state to the executive committee his interpretation of the evidence supposed to have been heard by the student committee; then the petitioners, without hearing or being permitted to examine or cross-examine the accusing wit-

nesses, were called in before the executive committee and offered the opportunity to deny their guilt. *Such was not a rehearing of the testimony* as directed by the Trustees of the University (R. pp. 65-68).

Having been thus thwarted by Dean Hyman in their efforts to get a hearing or trial, petitioners then requested a hearing before the Board of Trustees. The Trustees appointed a committee for the purpose of granting petitioners a hearing. While the Trustees had authority to make rules and regulations for the discipline of students, and while they could have, by such rules and regulations, set up a trial procedure with appeal to the Trustees in disciplinary cases, such was not done. The Trustees maintained their authority and obligation to transact the business of the University. The Trustees, therefore, retained the obligation to give the petitioners a hearing not inconsistent with the constitution and laws of the United States when such hearing was requested. This is more especially true where the faculty had not afforded the students any reasonable and lawful hearing of its own accord. Petitioners were not asking for a review of the former hearings, because the former hearings, not affording due process of law, were no hearings at all and could not be reviewed. Petitioners were requesting the Trustees to give them a hearing—a day in court. They definitely requested the committee of the Trustees to allow them an opportunity to hear the testimony against them, to examine and cross-examine the witnesses with an opportunity to face the accusers, and also requested a more definite and specific statement of the charges against petitioners (Letter, Exhibit "C", R. pp. 11-12, 80-81).

Nevertheless, the committee of Trustees heard no testimony against petitioners but accepted the ex parte hearsay statement of Dean Hyman as to the testimony before the student or grand jury committee. Petitioners were not allowed to hear Dean Hyman's statement or to examine or cross-examine him or to see any record or purported record of the supposed testimony against them. Petitioners were merely allowed to appear before the committee of trustees and to make any statement which they cared to make, to remove the presumption of guilt resting against them (R. pp. 13-15). Protesting against the procedure adopted and reserving their rights, petitioners appeared, denying their guilt, and proved good character and reputation.

The committee of the Trustees, although appointed *for the purpose of granting petitioners a hearing,* attempted to act as an appellate court instead of having a fair hearing with common-law safeguards. It could not act as an appellate court without a record or transcript of prior proceedings available to both parties. It was so held under similar circumstances in the case of Jackson vs. State, 57 Neb. 183, where the Court says:

> "We will say here that we cannot consider the action of the Board (of Trustees) as in any sense a review of the hearing on appeal from the action of the faculty or principal."
> 57 Neb. at 189.

The committee, after hearing Dean Hyman's ex parte statement, in the absence of petitioners, and after hearing his reply to the evidence presented by petitioners (this reply also being made after petitioners were excluded from the hearing room), proceeded to order an affirmance of the expulsion of petitioners (R. p. 75).

The original bills for writs of mandamus set forth the only notices petitioners were given before they were called before the student investigating committee. These notices were as follows:

> "A joint committee of faculty and student body is investigating the stealing and selling of examination and quiz questions. Your name has been presented to the committee under circumstances that may have serious consequences to you. The committee meets again at 7 P. M. on Friday, October 18, in my office. Be certain to report in person to me at that time.
>
> Very truly yours,
>
> (Signed) O. W. Hyman, Ph. D., Dean."
> Record, page 10, 79.

At the time the above notice was given, *the evidence against petitioners had already been heard* by the investigating committee acting as a grand jury and was not reheard.

Each original bill for writ of mandamus also alleges and the returns filed by the defendants do not deny, that the expulsion of petitioners makes it impossible for them to practice their chosen profession. This allegation is:

> "Relator avers that by an association of universities, all accredited medical schools have adopted the policy of declining to accept a transfer of a student from one university to another where the student was expelled from one institution and seeks to transfer to another; that the unlawful, unfair, arbitrary, and capricious manner in which relator was ousted from the medical school of the University of Tennessee effectively barred him from proceeding with his medical education in any other accredited institution

and amounts to a deprivation of relator of property and the pursuit of happiness without a day in court."
Original bill (Record, page 8).
Stipulation (Record, page 92).

Each original bill further alleges:

"That the Joint (student) Committee, Executive Committee and Board of Trustees, in following the procedure which was adopted by them, acted arbitrarily, capriciously, unfairly and unlawfully, and their action was a denial of the constitutional rights of the relator, and deprived relator of substantial and very valuable rights, in that it deprived him of the right to pursue the vocation of his choice, and to proceed with the furtherance of his education."
Original Bill (Record, page 8).
Stipulation (Record, page 92).

The return of the defendants to the alternative writ of mandamus, in each case admits:

1. That the witnesses testifying against the relator were not under oath.
2. That "the relator *was not permitted* to be present at the time the testimony introduced (against him) was presented."
3. That "the relator was not confronted face to face with the witnesses who accused him and * * * * *was not permitted* to cross-examine such witnesses."
Return of Defendants (Record, page 23).
Stipulation (Record, page 92).

Elements of Due Process of Law

What is meant by the Fourteenth amendment denying states the right to take property without due process of law, and the extent to which these admitted facts failed to meet the requirements of due process of law, is indi-

cated by the following quotations from a few of the authorities:

(1) As to Specific Charge and Opportunity to Defend.

"The meaning (of due process, or the law of the land) is that no member of the State shall be disfranchised or deprived of any of his rights and privileges, unless the matter shall be adjudged against him *upon a trial* and *according to the course of the common law.* It must be ascertained judicially that he has *forfeited* his rights before he can be deprived of them."

Phillips vs. Lewis, 3 Tenn. 230.

"Before the Commissioner (of Insurance) can revoke the license of the agent, he is required to *notify him of the charge* which has been preferred against him, and *to give him a reasonable opportunity to make his defense.*"

Richardson vs. Reese, 165 Tenn. 670;
Hayden vs. Memphis, 100 Tenn. 583.

(2) Witnesses Should Be Sworn

"Before a witness is allowed to give his testimony he *must be sworn* to tell the truth."

70 C. J. p. 482, Witnesses, Sec. 650.

"It is a rule of the common law, in accord with the plainest principle of justice, that to warrant the removal of an official under a limited power, *specific charges* should be made, and, after notice, all witnesses in the matter *should be sworn.* Geter vs. Commissioners, 1 Bay, 354; Singleton vs. Commissioners, 2 Bay, 105."

Morley vs. Power, 73 Tenn. 700, 701.

(3) Cross-Examination Must Be Permitted

"The government further insists that the commerce act requires the (Interstate Commerce) Commission to obtain information necessary to enable it to perform the duties, and carry out the objects for which it was created, and (that) . . . . it can act . . . . on such information, and therefore its findings must be presumed to have been supported by such information even though not formally proved at the hearing."

Interstate Com. Comn. vs. L. & N. R. Co., 57 L. Ed. 431, at p. 434.

"But such a construction would nullify the right to a hearing, for manifestly there is *no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain or refute.* . . . But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which the rights are asserted or defended. In such cases the Commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and *must be given opportunity to cross-examine* witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. *In no other way can a party maintain its rights or make its defense.*"

Interstate Com. Comn. vs. L. & N. R. Co., 57 L. Ed. 431, at p. 434.

"The right to a hearing embraces not only the right to present evidence, but also a reasonable *opportunity to know the claims of opposing party and to meet them.* The right to submit argument implies that opportunity; otherwise, the right may be a barren one."

Morgan vs. U. S., 304 U. S. 18.

"*The opportunity to be heard must be such that the person* accused *may*, if he chooses, *cross-examine* the witnesses produced to sustain the claim, and produce

witnesses to refute it, if a question of fact is in issue."

Road Imp. Dist. No. 2 vs. Missouri Pac. R. R. 275 Fed. 600; CCA Ark. 1921.

"The right of the accused to be confronted by his accusers before the tribunal which pronounces upon the facts has always been deemed one of the most valuable safeguards of the citizen. It protects him against the peril of conviction by means of ex parte testimony or affidavits given in his absence or when he had not the right of cross-examination. It is generally agreed that the process of confrontation has two purposes—the main and essential one and a secondary one. The main and essential purpose of confrontation is to secure the opportunity of cross-examination."

14 Amer. Jurisprudence 888, Sec. 176.

"No injustice is done to the party seeking to avail himself of the evidence to require that, *before its admission,* its truth shall be subjected to such tests as the experience of ages has shown were necessary to render reliance thereon at all safe, and, where this has been prevented without any fault of the adverse party, *to exclude the evidence.*"

People vs. Cole, 43 N. Y. 508.

The editor of L. R. A. Note following the case of Wray vs. State, 15 L. R. A. 493, in commenting upon the decision in People vs. Cole, says:

"This decision, although rendered in a criminal case, is not based . . . upon the fact that the defendant was deprived of his constitutional right to be confronted by the witness, but upon the common-law rule that *no evidence should be admitted but what was or might be under the examination of both parties.*"

Note 15 L. R. A. (N. S.) p. 494.

"The right of opposing counsel to cross-examine a witness introduced by the other party is elementary, and has always been recognized and enforced. *At*

common law no evidence might be admitted but what was, or might be, under the examination of both parties."

Cumberland R. Co. vs. Girdner, (Ky.) 192 S. W. 873 at 874.

"The benefit of cross-examination is an essential condition to the reception of direct testimony (Heath vs. Waters, 40 Mich. 457, 471)."

Sperry vs. Estate of Franklin Moore, 4 N. W. (Mich.) 18.

"Cross-examination is a valuable right, and where a witness refuses to answer thereon questions which are proper and material subject of inquiry, in view of the testimony which he gave upon his direct examination, his *entire testimony will be stricken or disregarded."*

Thomas vs. Dower, et al. (Wash.) 297 Pac. 1094 at 1095.

"It is a universal rule that when a witness has been examined in chief, the cross-examination of a witness by the adverse party is a matter of right, there being a clear right in the opposing party to cross-examine the witness to *elicit suppressed facts* which *weaken or qualify the case of the party examining in chief* or *support the cross-examining party."*

Aluminum Industries, Inc. vs. Egan (Ohio), 22 N. E. (2d) 459, at page 462.

(4) Relators Were Presumed Guilty and Not Afforded a Presumption of Innocence

Because it is so closely in point, we hereafter comment further on the case of Commonwealth, ex rel. vs. McCauley, 3 Pa. (C. C.) 77, but we wish here to call attention to the following quotation:

"There is another serious objection to the validity of the trial under consideration. When Hill was brought before the faculty he was informed that *they were satisfied, persuaded or convinced* of his

connection with the riotous disturbance of the previous Tuesday evening and leave was granted him to make any statement which he saw fit. The words addressed to him bear no other interpretation, and could have produced no other impression upon his mind, *than that he was called upon to remove the conviction* which had been produced in their minds that he was culpably connected with the disorders indicated.

". . . 'It should have been proved that the party had committed the offense, instead of which the defendants presumed him guilty, and called upon him to show why he should not pay the penalties, and this was a decisive objection'."

Commonwealth, ex rel. vs. McCauley, 3 Pa. C. C. Reports, p. 77 at 85.

See quotation supra, this brief p. 16. Return, Exhibit 1, pages 44, 52.

All of the above safeguards provided by the common law were denied to the petitioners in this case.

Petitioners Deprived of a Property

The removal of petitioners from the medical school and thereby from their profession was, under the authorities, depriving them of property. Since the common law safegards were not afforded in any of the so-called hearings granted petitioners, they have been deprived of a property without due process of law. The petitioners had a contract right to continue their course of study until that right had been forfeited and the forfeiture determined in a lawful way. The contract right to continue their studies is a property right. Petitioners' good reputations have been greatly damaged. They had a property right in their reputation which could not law-

fully be taken from them except upon a fair and lawful determination of their guilt. That the right to continue one's education in a public institution is contractual and is a property right and is protected by the due process clause from being taken unlawfully, unfairly, arbitrarily or capriciously is definitely shown by the authorities cited in the brief.

In the case of Butchers' Union, Etc. Co. vs. Crescent City, Etc. Co., 111 U. S. 746, 28 L. Ed. 585, this Court in defining property rights protected by the constitution uses this language:

> "The right to follow any of the common occupations of life is an inalienable right; it was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'All men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness'. This right is a large ingredient in the civil liberty of the citizen.
>
> "I hold that the liberty of pursuit, the right to follow any of the ordinary callings of life, is one of the privileges of a citizen of the United States."

Referring to the Slaughter House cases in which the phrase "privileges and immunities of the citizens of the United States" was construed, Justice Bradley in his concurring opinion, says further

> "I then held and still hold, that the phrase has a broader meaning; that it includes those fundamental privileges and immunities which belong essentially to the citizens of every free government among which Mr. Justice Washington enumerates the right of protection; the right to pursue and obtain happiness and

> safety; the right to pass through and reside in any state for purposes of trade, agriculture, professional pursuits or otherwise; to claim the benefit of the writ of habeas corpus, to institute and maintain actions of any kind in the courts of the State; and to take, hold and dispose of property, either real or personal. Corfield v. Coryell, 4 Wash. (C.C.) 371."
> 28 L. Ed. 589.

The above definitions would necessarily include in the pursuit of happiness the right of a citizen to pursue his education for a chosen profession in a public school.

There is a definite statement of the rights of petitioners in Corpus Juris as follows:

> "A college cannot dismiss a student except on a hearing in accordance with a lawful form of procedure, giving him notice of the charge and an opportunity to hear the testimony against him, to question witnesses, and to rebut the evidence. A student wrongfully dismissed is entitled to reinstatement, since an action for breach of contract would not afford adequate relief."
> 11 Corpus Juris, 998.

To the same effect is a similar statement in 27 Ruling Case Law, page 144.

In an article published in 12 Va. Law Review, the rule is stated as follows:

> "There can be in such cases (referring to the public schools) no question of contractual rights possessed by the students or applicants for admission; . . . mandamus has issued to review the alleged arbitrary and capricious exercise of discretionary power in violation of the rights of pupils, teachers or super-

intendents of public educational institutions in a great many cases."

12 Va. Law Review, p. 650.

The language cited above from Corpus Juris and Ruling Case Law was quoted with approval in the well considered case of Anthony vs. Syracuse University, 223 N. Y. Supplement, 796. In that case the student was pursuing a course of study for a profession—as instructor in home economics. The University was a public institution and part of the public school system. A regulation had been passed providing that the University might discharge a student at any time for any cause. In holding that such regulation was unreasonable and that the student had a contractual right to complete her education unless she was shown in a fair hearing to have forfeited that right, the court quotes the language which we have quoted above from Corpus Juris and says:

"The relationship created amounts to this (a contract) and more; it means the establishment of associations . . . which become endowments of great value to the student in subsequent life—values which are very great and cannot be measured in dollars. The selection of one's institution of learning . . . is usually made with regard to the prospective student's career in life; once made, and followed by long attendance, it can not without serious loss be changed, and dismissal is pregnant with consequences which may spell the ruination of a life."

223 N. Y. Sup. 802.

Referring to the injury to the reputation of the student, the Court says further:

"The right to reputation is an inalienable right, like the right to life, liberty and the pursuit of happiness . . . Such an inalienable right may not be

> legally waived . . . Plaintiff is entitled to a judgment directing her reinstatement."
> 223 N. Y. Sup. 810-811.

In the case of Frank vs. Marquette University, 245 N. W. (Wis.) 125, the petitioner, a medical student, alleged that although he had completed his course and was entitled to have a diploma, he was

> ". . . arbitrarily expelled . . . upon vague and uncertain charges without a hearing, without notice of the charges against him and without an opportunity to hear the testimony against him, to question witnesses or to rebut their testimony; that, although he has continually demanded a hearing, such demand has been ignored."

The sufficiency of these allegations in support of the petition for an order compelling the issuance of the diploma was conceded in that issue was joined on the facts. The appeal was from an interlocutory order denying petitioner the right to inspect certain records as to other students, but the court lays down this definite rule of law as controlling the lower court in its further proceedings:

> "The law is apparently well settled that a university, college or school may not arbitrarily or capriciously dismiss a student or deny to him the right to continue his course of study therein."
> 245 N. W. 127.

The Fourteenth Amendment was considered as applicable to such a case, although it was held that the constitutional provision was not violated by the particular order appealed from.

In the case of Jackson vs. State, 57 Neb. 183, a normal school student was rejected by the school authorities without a hearing affording due process of law. Mandamus was granted, the court saying:

> "There was herein alleged the deprivation of a valuable right."
> 57 Neb. 188-189.

In the case of Gleason vs. the University of Minn., 116 N. W., 650, a law student attempted to matriculate for a new term in the law school of the University, a public school, and was notified that he had been dropped from the school "for certain insubordinate acts." The application for mandamus alleged that the student was expelled and refused the right to matriculate without affording him a hearing—without due process. The court held that the accusation of the student was not sufficient to establish his guilt and that such guilt must be established by evidence, although the charges, if sustained, were amply sufficient. In that case, the faculty may have had in its secret sessions what was thought to be sufficient evidence, but this proof was not offered at any hearing. The defendants demurred to the petition for mandamus and appealed from order overruling their demurrer. The sufficiency of the facts alleged was thus brought in issue.

The Court says:

> "The fact that he was 'charged' with insubordination does not warrant the inference that he was guilty or that he had proved himself in all respects to be unworthy as a student. We are of the opinion, therefore, that the petition states a prima facie case for registration, and that the Regents should show cause as directed by the court below."
> 116 N. W. 652.

In our present case, the return of the defendants admits the deficiencies of the hearing as hereinabove set out, and the facts thus established show that petitioners Sherman and Avakian have been arbitrarily discharged without due process of law.

The principles above set out were applied in the case of the expelling of a pupil from a public school, under strikingly similar circumstances in the case of Commonwealth ex rel. vs. McCauley, 3 Pa. C. C. Reports, p. 77. There, as in the instant case, the faculty heard statements in the absence of the accused, Hill, and considered that it had sufficient evidence of his guilt to justify expelling him. We quote the following:

> "Mr. Hill, the faculty are satisfied that you were connected with a riotous conduct on Tuesday night the 9th of November, and they have asked you to come in that you might make any statement in regard to the matter you may wish, if any."

Hill was not confronted with his witnesses, nor was he offered an opportunity to cross-examine them. The Court says:

> "In order to justify his dismissal, it must appear that he was notified that a charge of misconduct was made against him, which was so fully, plainly and substantially described, that he might clearly apprehend it, realize its gravity and the possible harm which might come to him, if it were sustained, and thus be admonished of the necessity of preparing to meet it. *He was entitled to know what testimony had been given against him, and by whom it had been delivered, and that the proofs be made openly and in his presence, with a full opportunity to question the witnesses* and to call others to explain or contradict their testimony.
>
> "Of these essentials of a proper trial, there were many wanting in the case of Hill."

After citing other cases of somewhat similar import, the Court proceeds to deal with the rights and authority of the faculty of the College, saying:

> "Those who manage it are not irresponsible to the laws of the land. Their acts are not beyond the scrutiny, and if needs be, the correction of the courts. Its object is the education of youth, and it was their welfare that prompted the State to found the institution and confer benefits upon it, and that must also be its chief concern. They (the students) have the right of admission to its hall, when properly qualified and well-behaved, and it would be absurd, therefore, to hold that they can be excluded except *for due cause, properly ascertained.* Laws can be made to regulate the deportment of its students not inconsistent with those of the state. For their infraction, punishment can be inflicted, but *guilt should be ascertained in a manner which commends itself to justice,* and, when duly ascertained, there can be no supervision of the conclusion arrived at, and a sentence can be inflicted which is not unreasonable, taking into consideration the character of the offense.
>
> "The rights of the courts to interfere to this extent was declared by us in the application for the alternative writ in this case. Careful examination of the authorities and consideration of legal principles, since that time, has made this indubitable to our mind, under the laws of this state at least."

The case of Baltimore University vs. Colton, 98 Md. 623, involved the expelling of a law student from a private college as to which the Maryland Court says:

> "Of course, if one becomes a voluntary member of an incorporated society or association where by-laws provide for expulsion for specific causes the right of amotion is clearly established in the corporate body and may be duly exercised in the manner and

> for the purpose prescribed, but here there was not only an expulsion without notice, but it does not appear that the defendant corporation has ever enacted any by-law on the subject, or that, if any, they were complied with."
>
> 98 Md. 636.

While the rights of an adult student in a professional school or college are more important and are to be more zealously guarded by the courts, the rights of a pupil to attend any public school are similar except insofar as the rights of a minor pupil are modified by the doctrine that the authorities of the school stand in loco parentis to the minor student. In the case of Gabrielli vs. Knickerbocker, 74 Pac. (2d) (Cal.) 290, the student, a member of the religious denomination known as Jehovah's Witnesses (recently before this court 11 Law Week 4244), had religious scruples against the saluting of the flag. The California court, in sustaining the writ of mandate requiring the school authorities to reinstate the pupil, states the rights of the pupil under the constitution as follows:

> "The advantage or benefit thereby vouchsafed to each child of attending a public school is, therefore, one derived and secured under the highest sanction of positive law . . . It (the right of attending public schools) is, therefore, a right—a legal right—as distinctively so as the vested right in property owned is a legal right, and as such it is protected, and entitled to be protected by all the guaranties by which other legal rights are protected and secured to the possessor."
>
> Gabrielli vs. Knickerbocker, 74 Pac. (2d) (Cal) 290, 292.

In regard to the right of the school authority to prescribe the duties to be performed by the pupils, the California court further says:

> "While the rules and regulations of the district are to be liberally construed, *when it comes to the deprivation of a constitutional right it must be shown that the legal procedure in making the deprivation* has been substantially followed.
> 74 Pac. (2d) 293.

To the same effect is the case of Piper vs. Big Pine School District, 226 Pac. (Cal.) 926, which arises out of a discrimination against a pupil of the Indian race.

Likewise in the case of Johnson vs. the Town of Deerfield, 25 Fed. Sup., 918, although the decision of the school committee was held not to violate the constitutional right of the pupil to attend the public school, it was nevertheless held that such right did exist and can not be arbitrarily taken from the student. The Court says:

> "It is further contended that the Mass. statute deprives the plaintiff of *constitutional rights* to attend the public schools. *Granting, as we think we must, that such right exists,* it is not an absolute right but is one which is at all times subject to such *reasonable conditions* as the state may impose."
> 25 Fed. Sup., 921.

In the case of State Ex Rel. vs. Wilson, 297 S. W. (Mo.) 419, the question presented was quite similar to that in the instant case. The student who petitioned for writ of mandamus against the school authorities, completed her course in grammar school and first year high school but the school authorities declined to give her a certificate of credit because of the student's failure to pay an assess-

ment levied by the school on all first year high school students. The court determined that the assessment was not a legal prerequisite to the issuance of the credits to the petitioner and ordered the peremptory writ of mandamus to be issued. The court says:

> "The right of children, of and within the prescribed school age, to attend the public school established in their district for them is not a privilege dependent upon the discretion of any one, but is a *fundamental right, which can not be denied,* except for the general welfare. Lehew vs. Brummell, 103 Mo. 546, 15 S. W. 765, 11 L. R. A. 828, 23 Am. St. Rep. 895."
>
> 297 S. W. p. 420.

In the case of Cross vs. Board of Trustees of Walton College, 121 Ky. 469, a resident of the school district was denied the right to pursue his education in the public school and was expelled without a trial affording the safeguards of the common law. The Court held:

> "Nothing can be more important to the upholding and maintenance of the common school system in its integrity than the enforcement of wholesome and reasonable discipline among the students. This high duty is cast upon the Trustees and the courts will never interfere with them while acting within their legal province; *but the exercise of arbitrary power* is forbidden by the Constitution to any man or set of men within this commonwealth."
>
> Pages 476, 477.

From the above authorities the similarity between students in schools and colleges and men in business callings, professions, members of associations or corporations, and office holders, is shown. The above authorities declare that the right of a citizen to prepare himself for his life's

work by attending a public school or college is a property right. That property right is not materially different from the right to practice his life's calling after he has completed his education. The removal of petitioners from their professional school and thereby from their professions is strikingly similar to the revoking of the license of a doctor or other licensed business man or the ousting of a school teacher, member of a corporation, or public officer. In all such cases, the common law safeguards constituting due process of law are guaranteed.

Petitioners qualified themselves by preliminary education and were accepted by the medical school and continued their course of study for two complete years. These facts establish a contract between petitioners and the school of the state under which the petitioners are entitled to continue their course of study unless that right is forfeited and the forfeiture duly determined. Not only must the regulation alleged to have been violated by the petitioners be a reasonable regulation, but the determination of the fact of violation must not be unlawful, unreasonable or capricious and must afford petitioners due process of law.

Likewise, if petitioners had completed their education and qualified themselves as doctors, a contract would exist between them and the medical board of the state, under which contract they would have the right to continue their profession unless that right is forfeited and the forfeiture duly determined. The right to complete the course of study and the right to pursue one's profession are similar if not identical property rights protected by the constitution. These property rights are, of course, subject to the police power and may be forfeited or lost;

but, where the fact of forfeiture is denied, that fact must be established in a procedure providing due process of law. There are so many cases involving the principle above stated as to professions and businesses licensed by the states that we mention only a few from the State of Tennessee.

In the Tennessee case of State Board of Medical Examiners vs. Friedman, 150 Tenn. 152, the question was the legality of procedure whereby Dr. Friedman's license was revoked. The Supreme Court of Tennessee, following this Court's decision above quoted, says:

> "We think the right to practice medicine is, undoubtedly, a property right, of which the complainant cannot be illegally deprived (Citing authorities)."
>
> 150 Tenn. p. 166.

The Court proceeds further:

> "In People vs. Love, supra, after stating that the exercise of the police power is necessary and permissible with regard to the professions of medicine and of law, it is said:
>
> " 'The right to follow either one of these professions is one of the fundamental rights of citizenship. A person's business, profession or occupation is at the same time "property" within the meaning of the constitutional provisions as to due process of law, and is also included in the right to liberty and the pursuit of happiness'.
>
> "In Butchers' Union Co. vs. Crescent City Co., supra, it was said (then follows the quotation first above set out)."

The early Tennessee case of Morley vs. Power, 73 Tenn. 691, involved a petition for mandamus filed by three

school teachers who had been elected by a school district but who were later notified that they had been discharged. The Court says:

> "The answer says that petitioner was not qualified to teach, and the defendants decided to discharge him and did so. * * *
>
> "There is no pretense of any notice or formal proceeding in the case. The defendants, according to their answer, and the statements in their bills, simply notified the petitioner that he was removed. And if the answer had shown the most formal proceeding, no evidence has been introduced to show the exercise of power within the limitation. * * *
>
> "Render judgment here for a peremptory mandamus in favor of each of the petitioners with costs."
>
> 73 Tenn. 700, 701.

In another early Tennessee case, Hawkins vs. Kercheval, 78 Tenn. 540,

> "The bill as amended was in substance a proceeding by the complainant to compel the mayor of the city and the police commissioners to reinstate him in office from which he had been improperly suspended by the mayor and never legally removed by the commissioners. It was an application for a mandamus through the forms of the court of chancery * * *."
>
> Hawkins vs. Kercheval, 78 Tenn. at p. 542.

The Court then concludes that the trial afforded Hawkins was not due process of law, and says:

> "But in the case before us, there was clearly *no charge* within the power, *nor any trial* upon such a charge, *and the proceedings were therefore void*: Morley vs. Power, 5 Lea, 691. The complainant *has never been legally removed from office*, and is still a sergeant of the police, and as such entitled to be reinstated in all his rights."
>
> Hawkins vs. Kercheval, 78 Tenn. (10 Lea) at p. 543.

In the case of Hayden vs. Memphis, 100 Tenn. p. 580, the Court was reviewing the action of the City Council in removing a member of the Council. The Supreme Court of Tennessee says:

> "Whether acting upon express legislative warrant or the exercise of inherent power in the matter of amotion, the corporation must act with some degree of *conformity to the rules of common law.*"

Nature of Ruling Against Petitioners Requires Relief

We have heretofore stated that the order expelling petitioners is not limited as to time, and prevents them from ever returning to the University of Tennessee. Not only so, but because of the association of medical colleges, petitioners can not ever enter another accredited medical school. Since they must have a diploma from an accredited medical school before they can practice their profession in Tennessee, and many other states, their expulsion amounts to an expulsion for life from the medical profession. The authorities which we have cited above are based upon facts which showed the expulsion from a particular school, school district, or college. The authorities point out that even such an order of expulsion deprives a student of a property right and may destroy his reputation or ruin his life. The reasoning applies much more strongly where the order of expulsion destroys the right of the pupil to attend any accredited medical school and thereby prevents him from ever practicing his chosen profession.

The order of expulsion against petitioners is, therefore, equivalent to a sentence against them for life. As was well stated in the case of State Medical Board of Ex-

aminers vs. Friedman, 150 Tenn. 171, a proceeding to deprive a citizen of his right to practice his profession is criminal in its nature and, therefore, the procedure adopted must conform to law and provide the common law safeguards. In the above case the Court says:

> "The result, it is true, would not subject the defendant to imprisonment or the chain gang and resulted merely in the revocation of his physician's license and the striking of his name from the record kept in the Clerk's office of the superior court. But this itself was a penalty and the proceedings are in the nature of criminal proceedings. The proceedings were certainly quasicriminal in character."
> 150 Tenn. 171.

Administrative Difficulties

It was the contention of the defendants below that the faculty and trustees of the University should not be required to afford these petitioners a trial or hearing affording petitioners the safeguards of common law because of administrative difficulties. It is usually harder to convict when the defendant is granted his constitutional rights; but the fact that conviction is more difficult does not afford a reasonable excuse for denying to the accused his constitutional right to a trial or hearing. It was known when those constitutional rights were established that it would be more difficult to convict where the constitutional rights are preserved to the accused, but this is justified because it is also more difficult to convict an innocent person. Administrative difficulties are no excuse for denying a reasonable hearing to the accused, either by courts, by commissions, by boards, or by faculties; all act for the same purpose of judicially determining the guilt or innocence of the accused. It

is not the formality of the trial which is necessary, but it is the reasonable compliance with the common law that is demanded. The trial may be informal and the accused nevertheless confronted by his witnesses and offered an opportunity to ask them questions for the purpose of impeaching them. Such informal hearings were had in some of the cases and held sufficient.

Distinguishable Authorities

Respondents will probably cite some authorities in apparent conflict with the contentions herein set forth. However, a careful examination of these authorities will place most, if not all, of them in one or the other of these categories: (1) Cases involving private institutions; or (2) institutions as to which the civil law is applicable; (3) cases in which the applicant was not qualified and accepted as a student and, therefore, did not have a contract with the school; (4) cases in which a minor student is subject to discipline and the school stands *in loco parentis*; (5) cases in which the student admits or refuses to deny his guilt; or where the act complained of was committed in the presence of the faculty and can not be questioned.

However, we conceive the facts of the present case to be entirely different from any of the circumstances above. The University of Tennessee is a public institution, the head of the public school system of Tennessee; by its charter it is expressly controlled by the common law; the petitioners were qualified and accepted as students and thereby had a contract with the institution to continue their studies unless they forfeited that right and the forfeiture was duly determined by proceedings af-

fording a reasonable hearing and opportunity to defend; the petitioners are men, not children; they are men seeking a professional education, not a grammar or high school training; and in addition, the sentence here is not merely preventing the petitioners from attending a particular school but is in fact a judgment of attainder prohibiting them from practicing their chosen profession, and the sentence endures for their lives. Petitioners have always denied and continue to deny their guilt.

Conclusion

It is our conception that the petitioners are by our constitution protected from the arbitrary and unlawful deprivation of their property rights; that the constitution requires that petitioners be afforded a fair trial with due process of law; a reasonable opportunity to defend the charges against them before this substantial right may be taken away from them. It is our conception that such a fair trial requires a reasonable opportunity to know what they are accused of, to know what is testified to against them, to have that testimony safeguarded by an oath, and subjected to cross-examination to test its credibility; for without such a trial there can be no reasonable opportunity to defend.

If the petitioners are entitled to such a fair and reasonable trial to determine their guilt before they are thrown out of their profession and sentenced never to become physicians or surgeons, then the writ of certiorari

should be granted by this Court to the Supreme Court of Tennessee and the decree of that Court should be reversed and peremptory writ of mandamus should issue.

Respectfully submitted,

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(17)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 911

STATE OF TENNESSEE ex Rel. PHILIP J. SHERMAN AND JOHN V. AVAKIAN,

Petitioners,

vs.

O. W. HYMAN, Dean of the University of Tennessee College of Medicine et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

BRIEF FOR RESPONDENTS.

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BRIEF FOR RESPONDENTS.

May it Please the Court:

Deeming the statement of the case made by the petitioners both inaccurate and inadequate, the respondents make the following statement:

The petitioners were students of the Medical Department of the University of Tennessee located at Memphis.

In August, 1940, it came to the attention of the faculty of this institution that questions to be used upon examinations had been surreptitiously taken and were being sold among the students of the institution (R. 19, 20). Thereupon a student council was organized for the purpose of ascertaining the guilty parties and recommending disciplinary action to the faculty (R. 20). At the outset of the inquiry, it was determined as a matter of policy that those students who had merely purchased such questions would not be disciplined (R. 31, 32).

As the testimony bearing upon the case of the two petitioners is separate, it will be necessary to make a brief statement with reference to each.

Philip J. Sherman.

At the hearing before this student council three witnesses gave testimony connecting Sherman with the sale of these questions (R. 39, 40, 44). Sherman was later called before this student council and denied all connection with the theft and sale of these questions (R. 44). He was then notified to appear before the faculty committee charged with final action, upon the next day. He declined to so appear, assigning business reasons for his refusal (R. 45, 88-89). The student council recommended to the faculty that Sherman be expelled (R. 48).

Thereupon at a meeting of the faculty committee Sherman was expelled for three causes, to-wit, on the basis of testimony heard by the student council, for refusing to cooperate with the student committee at its investigation and for refusing to appear before the faculty when summoned (R. 49).

At a later date Sherman made a request that his expulsion be reconsidered and the faculty committee, augmented by the President of the University, met for this purpose (R.

65), and there was read to him the substance of the testimony against him upon this charge (R. 67). He was heard in his own behalf and denied such testimony but he was unable to assign any rational reason leading to a belief in the falsity of the most important witness against him (R. 66-67). At this hearing he made no request that he be confronted with his accusers nor that he be accorded the right of cross-examination nor was any limitation placed upon his right to introduce testimony in his own behalf. Thereupon the faculty committee reaffirmed their earlier conclusion (R. 68).

Avakian.

One witness appearing before the student council gave testimony to the effect that Avakian had offered to sell him questions and as evidencing the genuineness of such questions had permitted him to read the first of such questions. A comparison of this question with those stolen proved it genuine (R. 34-35). Avakian was called before the student council and made a denial of the charges against him (R. 45). He was notified that he would be called before the faculty committee. A recommendation was made by the student council that he be arraigned before the faculty but no recommendation was made to the faculty as to the action to be taken by them (R. 51).

Avakian was duly called before the faculty committee and a summary of the testimony accusing him was read to him (R. 52). He denied the truthfulness of such testimony and assigned personal animosity on the part of the giver thereof as the reason for its falsity (R. 52). Thereupon the faculty deeming the evidence against him too contradictory for final action at that time, postponed any final decision until additional information upon the matter might be had (R. 53). Thereupon a former student of the col-

lege who refused to appear before the faculty committee, made the statement to the Dean of the college that Avakian had offered to sell him questions at a prior date. Since this witness refused to appear, the faculty agreed to accept his statement made to the Dean (R. 60). Avakian was called again before the faculty committee and informed of this additional testimony against him (R. 61). He denied it but was unable to suggest any plausible reason for its falsity (R. 61). The faculty committee voted to expel him (R. 61).

He was granted a rehearing before the same tribunal or organization as that sitting upon the rehearing of the case of Sherman. At this hearing he was permitted to be heard in his own defense and to review his previous testimony and the charges against him (R. 68).

So far as the record goes, upon this hearing, there was no request made by Avakian that he be confronted with his accusers, that he be permitted to cross-examine them, nor is it suggested that he was not allowed to present any testimony he wished to offer.

Both Sherman and Avakian appealed to the Board of Trustees of the University and a special committee was appointed to hear such appeal. It met and then for the first time was a demand made for a copy of the accusation and for confrontation and cross-examination (R. 13-15). The special committee determined that their function in the matter was appellate rather than original but expressly granted to each of the petitioners the right to introduce such testimony as they chose (R. 17). This committee of the Board of Trustees adverted to their lack of judicial powers and to the absence of any power on their part to compel the production of testimony (R. 17). After a consideration of the testimony the action of the faculty was affirmed (R. 75).

At all times there were in existence in Tennessee statutes providing for a review of the action of the boards and commissions exercising judicial functions with the express right to a trial *de novo* in a court of competent jurisdiction. These statutes are Sections 8989, 8990, 8998, 9008, 9014, 9015 and 9017 of the Code of Tennessee. They are printed in the appendix of this brief for the convenience of the Court.

Instead of undertaking to pursue this statutory procedure to obtain a review of the action of the tribunals of which complaint is now made with a trial *de novo* in a court of competent jurisdiction the petitioners instituted a collateral attack upon the action of the school authorities by filing a petition for a writ of mandamus seeking to compel their reinstatement upon the theory that the various proceedings above mentioned were absolutely void.

The Supreme Court of Tennessee did not, as stated in the petition for the writ (p. 5) hold that the petitioners were not entitled to a trial and hearing, but on the contrary, held that petitioners had been given such a hearing as met the requirements of justice and a fair and reasonable opportunity to make defense (R. 86-89).

It might be noticed at this point that the claim that Sherman was persecuted by virtue of his race and religion finds no basis in the record other than his own statement to such effect. That such is an afterthought upon his part may be inferred from the fact that nowhere in his pleading by which this action was instituted is there any suggestion that he was discriminated against by virtue of such, nor is there any mention of this fact in the opinion of the Supreme Court of Tennessee.

BRIEF.

I.

Statement Opposing Jurisdiction.

No claim of a right arising under the Constitution of the United States was specially set up and relied upon in the state court nor did the judgment sought to be reviewed deny any right, privilege or immunity specially set up or claimed under the Constitution of the United States.

Lynch v. *New York,* 293 U. S. 52;

Kipley v. *Illinois,* 170 U. S. 182, 42 L. Ed. 998;

Oxley Co. v. *Butler County,* 166 U. S. 648, 41 L. Ed. 1149;

Endowment Assn. v. *Kansas,* 120 U. S. 103, 30 L. Ed. 593;

U. S. Judicial Code, Sec. 344 subsec. (b).

II.

The statutes of Tennessee made adequate provision for a judicial review of the proceedings taken against petitioners with the right of a trial *de novo* in a court of general jurisdiction.

Code of Tennessee, Sections 8989, 8990, 8998, 9008, 9014, 9015, 9017;

Staples v. *Brown,* 113 Tenn. 639, 85 S. W. 254.

III.

Where there be an opportunity for judicial review, and a trial *de novo* at which time the validity of the proceedings may be tested, there is no lack of due process.

Bourjois v. *Chapman,* 301 U. S. 183;

Coffin Bros. v. *Bennett,* 277 U. S. 29;

Owenby v. *Morgan,* 256 U. S. 94;

Bragg v. *Weaver,* 251 U. S. 57, 64 L. Ed. 135;

Wilson v. *Standifer*, 184 U. S. 399, 415, 46 L. Ed. 612;
Backus v. *Ft. Street Depot Co.*, 169 U. S. 557, 42 L. Ed. 853.

IV.

In proceedings taken for the expulsion of a student from school, no formal trial in the sense of a legal proceeding is necessary. If the student be notified of the nature of the charge and be heard thereon, such constitutes a sufficient hearing.

State ex rel. v. *Clapp*, 81 Mont. 200, 263 Pac. 433, Certiorari denied 277 U. S. 591;
Vermillion v. *State*, 78 Neb. 107, 110 N. W. 736, 15 Anno. Cas. 401;
Koblitz v. *Western Reserve University*, 21 Ohio Cir. Ct. 144;
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Woods v. *Simpson*, 146 Md. 547, 126 Atl. 882, 39 A. L. R. 1016;
Board of Education v. *Purse*, 101 Ga. 422, 28 S. E. 896, 41 L. R. A. 593.

ARGUMENT

Upon the Jurisdiction of This Court.

As above stated, it is the insistence of the respondents that no adequate claim of a right, title or immunity arising under the Constitution of the United States was specially set up and relied upon by the petitioners in the Supreme Court and that the judgment of the Supreme Court of Ten-

nessee, as evidenced by its opinion, did not deny them any right, title or immunity set up under the Constitution. Upon the contrary, it appears from an inspection of the petition filed on behalf of the relators that they relied upon the laws and Constitution of Tennessee at all times as the source from which their rights sprung. That this is true will appear from the following excerpts from such petition.

From paragraph IV of the petition, we quote the following:

> "That such a student cannot be arbitrarily denied the right to continue his studies at the University, *but is entitled to a fair and full hearing and a reasonable opportunity to defend himself in accordance with the principles of Common Law* before he can be excluded * * *." (Italics ours). (R. 3.)

Likewise in paragraph IX of the original petition, we find the following averment:

> "Relator, feeling that he had not yet been afforded the *hearing guaranteed to him by the laws of the State of Tennessee*, sought legal advice * * *." (Italic ours.) (R. 5.)

In paragraph X of the petition we find the following statement:

> "Relator with his attorney appeared before the meeting of the Committee of Trustees, and *again requested a hearing conforming in some degree to the requirements of the law in this State* * * *." (Italic ours.) (R. 6.)

Finally, in the concluding portion of the petitions, the relators clearly relied upon their rights under the Constitution and the laws of the state as will be seen by the following quotation from paragraph XIII of such petitions:

> "as there is no other adequate remedy open to the relator *whereby he can obtain his re-instatement in*

the University to which he is clearly entitled by the constitution, the laws governing the University of Tennessee, and the contract which the relator had with the University of Tennessee; and that the officials herein named having refused to give relator a hearing required by law, * * *." (Italic ours.) (R. 8.)

The opinion of the Supreme Court of the State of Tennessee (R 81-90 incl.), makes no mention whatever of any rights relied upon arising under the Constitution of the United States. It is perfectly true that in the opinion the due process clause of the Constitution is mentioned but since Tennessee has a clause in its Constitution held to be synonymous with that of the Federal Constitution (Const. of Tenn., Art. I, Sec. 8; *State* v. *Staten*, 46 Tenn. 231, 244; *Railroad* v. *Harris*, 99 Tenn. 684, 704, 43 S. W. 115; *Harbison* v. *Iron Co.*, 103 Tenn. 421, 431, 53 S. W. 955), in view of the reference to the Constitution and laws of Tennessee in the petitions of the relators, this reference to the due process must be taken as applicable to the guaranty of the State Constitution in the absence of a positive averment to the effect that the Constitution of the United States was relied upon. This Court has held that an averment that action or a statute violates constitutional rights will be taken to refer to the State Constitution rather than of the United States in the absence of a specific mention of the later organic law. *Endowment Assn.* v. *Kansas, supra; Kipley* v. *Illinois, supra.*

The respondents respectfully insist that the case of *Oxley Co.* v. *Butler County, supra*, is directly in point upon this question with reference to the necessity of alleging *specially* the reliance upon a right, claim or immunity under the Constitution of the United States. From it, we quote the following:

"This court may re-examine the final judgment of the highest court of a state when the validity of a treaty

or statute of or an authority exercised under the United States is 'drawn in question' and the decision is against its validity, or when the validity of a statute of, or an authority exercised under, any state is 'drawn in question' on the ground of repugnancy to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity. *But it cannot review such final judgment, even if it denied some title, right, privilege or immunity of the unsuccessful party, unless it appear from the record that such title, right, privilege or immunity was 'specially set up or claimed' in the state court as belonging to such party, under the Constitution* or some treaty, statute, commission, or authority of the United States. U. S. Rev. Stat., sec. 709.

"*Looking into the record we do not find that any reference was made in the court of original jurisdiction to the Constitution of the United States. Nor can it be inferred from the opinion of the Supreme Court of Missouri that that court was informed by the contention of the parties that any Federal right, privilege, or immunity was intended to be asserted.* For aught that appears the state court proceeded in its determination of the cause without any thought that it was expected to decide a Federal question." (Italic ours.) (Page 653.)

"The only remaining question was not otherwise raised than by the general allegation that the decree was rendered against dead persons as well as in the absence of necessary parties who had no notice of the suit, and therefore no opportunity to be heard in vindication of their rights. Do such general allegations meet the statutory requirement that the final judgment of a state court may be re-examined here if it denies some title, right, privilege, or immunity 'specially set up or claimed' under the Constitution or authority of the United States? We think not. The specific contention now is that the decree of the Butler county circuit court in the suit instituted by the county of Butler was not consistent with the due process of law required by the 14th Amendment of the Constitution of the United States. But can it be said that the plaintiffs *specially* set up or claimed the protection of that Amendment

against the operation of that decree by simply averring—without referring to the Constitution or even adopting its phraseology—that the decree was passed against deceased persons as well as in the absence of necessary or indispensable parties?

"This question must receive a negative answer, if due effect be given to the words 'specially set up or claimed' in U. S. Rev. Stat., Sec. 709. These words were in the 25th section of the judiciary act of 1789 (1 Stat. at L. 85), and were inserted in order that the revisory power of this court should not extend to rights denied by the final judgment of the highest court of a state, unless the party claiming such rights plainly and distinctly indicated, before the state court disposed of the case, that they were claimed under the Constitution, treaties, or statutes of the United States. *The words 'specially set up or claimed' imply that if a party intends to invoke for the protection of his rights the Constitution of the United States or some treaty, statute, commission, or authority of the United States, he must so declare; and unless he does so declare 'specially', that is, unmistakably, this court is without authority to re-examine the final judgment of the state court. This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference.*" (Italic ours.) (Pages 654-55.)

In the comparatively recent case of *Lynch v. New York, supra,* we find the rule reaffirmed in the following language:

"It may be surmised, from the quotations in its opinion, that the Appellate Division intended to rest its decision upon a determination of the application of the Fourteenth Amendment, and that the affirmance by the Court of Appeals went upon the same ground, and not upon the non-federal ground of the application of the Constitution and laws of the State. *But jurisdiction cannot be founded upon surmise. Nor can claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record.*

"It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. *De Saussure* v. *Gaillard*, 127 U. S. 216, 234; *Johnson* v. *Risk*, 137 U. S. 300, 306, 307; *Wood Mowing & Reaping Machine Co.* v. *Skinner*, 139 U. S. 293, 295, 297; *Eustis* v. *Bolles*, 150 U. S. 361, 366, 367; *Whitney* v. *California*, 274 U. S. 357, 360, 361; *Mellon* v. *O'Neil*, 275 U. S. 212, 214. Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. *Allen* v. *Arguimbau*, 198 U. S. 149, 154, 155; *Johnson* v. *Risk, supra; Wood Mowing & Reaping Machine Co.* v. *Skinner, supra; Consolidated Turnpike Co.* v. *Norfolk & Ocean View Ry. Co.*, 228 U. S. 596, 599; *Cuyahoga River Power Co.* v. *Northern Realty Co.*, 244 U. S. 300, 302, 304." (Italic ours.) (Pages 54-55.)

Upon the strength of the foregoing authorities, the respondents respectfully insist that it nowhere appears either in the proceedings on behalf of the petitioners nor in the opinion of the Supreme Court of Tennessee sought to be reviewed that any claim of right under the Constitution of the United States was relied upon by the petitioners nor passed upon by the Supreme Court of Tennessee; but on the contrary, the Supreme Court of Tennessee in its opinion apparently treated the case as one arising under state law and the provisions of the State Constitution and nowhere in its opinion does it appear that it was aware that it was undertaking to dispose of or pass upon a Federal question.

So, therefore, the respondents respectfully insist that this Court should not take jurisdiction of the petition for this reason, if for no other.

Argument on Points II and III.

It is our insistence that the statutes of Tennessee accorded to the petitioners the right to a judicial hearing *de novo* of their expulsion with the right to supersede such expulsion and that having failed to avail themselves of this statutory right, they may not be heard to insist that they were not accorded due process. The code section relied upon by the respondents in general authorize the issuance of the writ of certiorari in all cases where an inferior tribunal, board or official exercising judicial functions has exceeded their jurisdiction or acts illegally; and also rights to review the action of such tribunal where no appeal be granted by law. Full provision is made for the issuance of a supersedeas by the sections mentioned and the Supreme Court has expressly held that these sections authorize on the part of the state court, a court of general jurisdiction, appellate and revisory jurisdiction over all inferior tribunals created by the legislature and vested with judicial powers. *Staples* v. *Brown, supra.*

As showing the extent to which the holding of the Supreme Court of Tennessee in this case goes, we quote the following from its opinion:

> "Circuit courts have original jurisdiction of all cases where jurisdiction is not conferred upon some other court, and a general appellate and revisory jurisdiction over all inferior tribunals, councils, and boards which may from time to time be created by the legislature and vested with judicial functions, to review their proceedings in all cases where they have exceeded their jurisdiction, or acted illegally or erroneously. Where no appeal or writ of error will lie, this jurisdiction

may be exercised by writs of certiorari and supersedeas, *and the case retried upon the merits*" (R. 644-45).

"This jurisdiction of the circuit court to supervise and review upon the merits the proceedings of all inferior jurisdictions, especially those proceedings not according to the course of the common law, by certiorari and supersedeas, where no appeal is allowed or writ of error will lie has been recognized and exercised from the earliest days of our judicial history, and is now too firmly established by constitutional provision, statutory enactment, and judicial decision to be a subject of controversy" (R. 646).

"There is, then, no doubt but that the circuit court has a general appellate and revisory jurisdiction over all inferior tribunals created by the legislature and vested with judicial powers, *which it may exercise by certiorari and supersedeas where no appeal or writ of error will lie,* for the correction of their judgments, not only when they have exceeded their jurisdiction or are acting irregularly, but *for errors of fact or law committed by them*" (Italic ours) (R. 655).

A number of instances of the use of this writ to review the proceedings of inferior tribunals are given in the opinion but will not be repeated here for the sake of brevity. It is sufficient to say that under the authority of this case the proceedings of the Board of Trustees or of the faculty committee could have been reviewed by the use of this writ and a trial *de novo* held thereon in the state court, a court of full and adequate jurisdiction. Obviously, the Board of Trustees of the University is charged by statute with the government and control of that institution. As incident to such government and control, necessarily they must determine questions governing the conduct of students and the punishment to be inflicted for breaches of discipline. The governing body of any institution of learning possesses

this power inherently; and in so sitting in judgment upon disciplinary matters, the Board of Trustees of the University necessarily acts by virtue of their legislative creation and also exercises quasi judicial functions and when the instances of the use of this writ to review proceedings of similar quasi judicial tribunals be examined as such instances are set out in the case of *Staples* v. *Brown, supra,* there can be no doubt in the mind but that this writ could have been employed to obtain a trial *de novo* of the charges against the petitioners, such trial to be heard in a court of competent jurisdiction.

Now then, the respondents respectfully insist that where the statutes of a state accord the right to a judicial hearing in connection with any administrative or quasi judicial hearings, due process of law is thereby accorded and that a party can not be heard to insist that he was not accorded due process of law where he failed to avail himself of a remedy given by the state which would accord him a full and complete hearing. Without any extensive compilation of authorities, we respectfully insist that the authorities cited in the brief proper, *supra,* upon this point clearly sustain our position. We quote from only one of them, to-wit, *Wilson* v. *Standifer,* wherein it is said:

> "It is scarcely necessary to say that this court, when asked to revise proceedings in state courts, have always held that due process of law is afforded litigants if they have an opportunity to be heard at any time before final judgment is entered. Walker *v.* Sauvinet, 92 U. S. 90, 23 L. ed. 678; Davidson *v.* New Orleans, 96 U. S. 97, 24 L. ed. 616; Spencer *v.* Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Gallup *v.* Schmidt, 183 U. S. 307, ante, 213, 22 Sup. Ct. Rep. 164; King *v.* Mullins, 171 U. S. 414, 43 L. ed. 214, 18 Sup. Ct. Rep. 925" (R. 415).

Instead of pursuing the statutory remedy available to them, the petitioners chose to ignore the same and to treat

the proceedings as being entirely invalid by filing the present proceeding which constitutes a collateral attack upon the validity of the actions of the faculty committee and of the special committee of the Board of Trustees. All questions with reference to the validity of the action under the state laws have been foreclosed against the petitioners by the decisions of the Supreme Court of Tennessee and the respondents respectfully insist that in view of the fact that a complete and adequate remedy for the review of the proceedings against them carrying with it the right to a hearing *de novo* and to a supersedeas staying the operation of the action of the school authorities was ignored when such procedure would have accorded due process, the petitioners can not now be heard to insist that the judgment of the state court did not accord them due process.

Argument on Point IV.

The respondents respectfully insist that when the hearing accorded the petitioners in the present case be tested by the authorities, it will appear that they were clearly accorded the type of hearing to which they were entitled under the law. The record shows (R. 66-7-8) that upon the hearing ordered by the Board of Trustees to be held by the faculty committee and the president, each of the petitioners was called before this committee to which had been superadded the president of the university. The charges against them were discussed in their presence and the substance of the testimony against them was likewise read in their presence. They were permitted to deny this testimony, to assign reasons for its falsity and the motives which they believed actuated the same and to make any further explanation desired by them. There was no complaint, so far as the record goes, upon their part that they were not thoroughly conversant with the charges against them, that they did not

know the identity of their accusers, nor so far as the record goes was there any demand from them that they be confronted with their accusers at this time or be permitted to cross-examine them.

Now, then, the respondents respectfully insist that the petitioners were not entitled to a multiplicity of hearings. When they were accorded one hearing at which they were furnished the opportunity to be heard in their own behalf and to deny the charges against them and to introduce such testimony as they might desire in *contradiction* to the accusations against them, their expulsion might lawfully follow upon an adverse finding at the conclusion of such hearing. There is no finding of anything akin to arbitrary or capricious action on the part of this executive committee. Certainly it definitely appears in the case of Avakian that the committee was unwilling to adjudicate him guilty upon the testimony of one witness with whom Avakian had had difficulties, and it was not until corroborating testimony connecting Avakian with the contemplated sale of such questions was adduced that the committee was willing to inflict expulsion upon him. Certainly this incident demonstrates a complete desire upon the part of this executive committee to reach the truth of the matter and not act until they were convinced as to wherein lay the truth.

But it may be contended that a demand for confrontation, for a copy of the accusation, for permission to cross-examine the witnesses and various other constitutional safeguards was made at the hearing before the committee of the Board of Trustees. We admit this. Our answer thereto is as follows: The Board of Trustees was under no legal obligation to accord a hearing to the petitioners. They might have denied the same and no rights of the petitioners, statutory or constitutional, would have been denied. It was completely discretionary for the Board of Trustees as to whether or not they should hold such hearing. Having the

power therefore to deny a hearing entirely at their hands, it lay well within their discretion to determine the type of hearing which they would hold. They were not obligated to hold a hearing *de novo,* but they might, as they did, hear the matter as does many a court review the proceedings of inferior tribunals, to-wit: upon the record produced before such inferior tribunal and with such additional proof as the parties might care to offer.

It is strenuously insisted that because the testimony heard by this student council and faculty committee was not under oath, that the petitioners were not accorded a fair hearing. Our answer to that is that there is no statute in existence in Tennessee authorizing the administration of an oath by school authorities in an investigation of this type and in the absence of authority upon their part to hear testimony under oath, the administration of an oath by a functionary empowered to swear witnesses would be an idle gesture and would give to the testimony no more verity and no more solemnity than had such oath been omitted.

The most strenuous insistence made on behalf of the petitioners was the absence of the opportunity to cross-examine the witnesses against the petitioners. This insistence apparently totally loses sight of the fact that neither this student council nor the faculty committee possessed then, nor possess now, the power to compel the attendance of witnesses and to punish a refusal to testify, and in the absence of the possession of such a power how can it be said with any degree of seriousness that the relators were denied their constitutional rights.

But it is urged most strenuously that because the proceedings before the student council indicated that one student was notified that he would not be permitted to remain in school unless he told all that he knew, that such instance showed that the University authorities could have

required the attendance of the witnesses if they had so chosen. In other words, counsel for petitioners insist that the University authorities were bound to use every coercive method at their command to require that the petitioners be confronted with the witnesses against them before it could be said that the duty to accord them a hearing on the question of their expulsion had been fairly complied with.

The respondents respectfully insist that such cannot be the law and that when school authorities use all of their legal powers to accord to one accused of misconduct a fair and impartial hearing, they are not required to exercise coercive measures or to use any type of extra legal influence to procure the attendance of witnesses. Cases no doubt occur frequently where the witnesses to the misconduct for which expulsion be sought, are not subject to the discipline of the school authorities to procure the involuntary attendance of such witnesses. In the present case one of the witnesses against Avakian was a former student of the school. He directly refused to appear before the faculty committee but did consent to appear and state to Dr. Hyman just what he knew. Now, then, the same rule must apply to all witnesses. There cannot be a confrontation as to certain witnesses and a non-confrontation as to others, and where it is obvious that oftentimes very material witnesses will not be subject to compulsory attendance but the authorities conducting such investigation are dependent upon their voluntary statement or appearance in undertaking to determine the facts, how can it be said that the failure to accord the person accused the right to cross-examine deprives him of a fair hearing where the authorities conducting the hearing possess no legal power to require the witnesses in question to appear for such cross-examination?

It is the insistence of these respondents that great latitude should be allowed scholastic authorities in disciplinary matters and where there has been a substantial effort to hold

a hearing and to hear both sides of the controversy and after such hearing a decision has been reached by the appropriate school authorities upon a charge within their jurisdiction, their conclusions ought not to be reviewed or disturbed by the courts for any supposed inadequacy of the nature of the hearing or a failure to comply with formalities substantially beyond their powers of compliance. The petitioners were entitled to one hearing and no more. They were given that as well as an additional review by the Board of Trustees. On their hearing before the faculty committee they took no exception to the sufficiency of the charges against them. They made no complaint there but that they were definitely aware of the nature of the accusation and the substance of the testimony against them. They made no demand that they be confronted by their accusers nor that they be permitted to cross-examine the witnesses against them. They were allowed to state facts in their own defense as fully and completely as they chose. There was no limitation upon the admission of testimony tending to exculpate them from the charges lodged against them, and there was certainly, so far as the record goes, no insistence at that time that any of the matters now complained of were denied them. Under such circumstances it is our insistence that they were accorded a complete hearing in the sense that such a hearing is required prior to expulsion.

So far as the petitioner Sherman be concerned, the Supreme Court of Tennessee adverted to the fact that he declined to appear before the faculty committee when they notified him so to do and held that this clearly showed an unwillingness to cooperate in the investigation and progress. That Sherman so declined is undisputed (R. 88-9). His refusal to cooperate was one of the grounds upon which the expulsion of Sherman was based (R. 49). So far as Sherman be concerned, therefore, his expulsion may rest upon the admitted fact that he did refuse to cooperate and the suffi-

ciency of this as a ground for expulsion does not present a question arising under the Constitution of the United States and his expulsion was apparently sustained by the Supreme Court of Tennessee upon this as well as other grounds.

When we come to the law, it is the insistence of the respondents that the overwhelming weight of authority sustains their position that a formal hearing is not necessary, proceeding with the solemnity of a judicial proceeding, but upon the contrary, all that is necessary is that the student be apprised of the charge, given an opportunity to be heard in his own defense, and that if such be done he may be lawfully expelled if the governing body of the institution determined his guilt from such informal hearing.

State v. *Clapp, supra,* seems to be the leading authority dealing with this contention. From it, we quote as follows:

> "The court made a finding 'that the relatrix Janet T. Ingersoll was not given a formal hearing in which written charges were filed against her and in which she was permitted to meet face to face the witnesses against her and cross-examine the same.' The main attack of counsel for plaintiff on the court's judgment is based upon the contention that under this finding no suspension of the plaintiff was authorized, it being their contention that she was entitled to a formal hearing upon the charges made against her; to be confronted with the witnesses who gave information against her, with the privilege of cross-examining them, and that she did not have an opportunity to call witnesses in her own behalf. This requires us to determine just what is meant by a hearing in a matter such as this.
>
> "It certainly cannot be maintained that it means a hearing like that which constitutes the trial of a chancery suit, or like the examination of one who is charged with the commission of an offense against the law, for the university to compel the attendance of witnesses or to force them to testify if they were in attendance.
>
> "Counsel for plaintiff have cited in support of their contention Commonwealth ex rel., Hill *v.* McCauley, 3

Pa. Ct. Rep. 77, and Anthony *v.* Syracuse University, 130 Misc. Rep. 249, 223 N. Y. S. 796. The first of the cited cases lays down the rule, as stated in the syllabus:

"'The student is entitled to notice of the charge preferred against him so that he may be able to prepare to meet it; and also to hear the proofs, with the full opportunity to question the witnesses and to call others to explain or contradict their testimony. Where it appears, upon the proper application of the student, that he had been dismissed without such hearing or trial, the court of common pleas will order his restoration by the writ of mandamus.'

"In 11 C. J. at p. 998, it is said:

"'A college cannot dismiss a student except on a hearing in accordance with a lawful form of procedure, giving him notice of the charge and an opportunity to hear the testimony against him, to question witnesses, and to rebut the evidence.'

"In support of this text Commonwealth ex rel., Hill *v.* McCauley, supra, and Gleason *v.* University of Minnesota, 104 Minn. 359, 116 N. W. 650, are cited as authority.

"A reading of the Gleason Case discloses that it has no application whatever to the rule announced in the text.

"In Anthony *v.* Syracuse University, supra, there was in question the validity of a rule of the university which reserved to it 'the right to require the withdrawal of any student at any time for any reason deemed sufficient to it, and no reason for requiring such withdrawal need be given.' A student had been summarily dismissed without charges having been made against her, and her request to be advised of the charges and for a hearing thereon had been denied. The court held the rule void, and directed that the student should be reinstated. In the course of the opinion the court quoted the language from 11 C. J. 998, which is above set forth.

"These are the only authorities which have been called to our attention which hold that, before a student

may be suspended from a college or university, it is necessary to hold a hearing attended with substantially the strictness and formality of a proceeding before a court, and they are based solely upon the language used in Commonwealth ex rel., Hill *v.* McCauley, above.

"A great number of decisions are opposed to the rule laid down in the authorities above cited. In Tanton *v.* McKenney, 226 Mich. 245, 197 N. W., 510, 33 A. L. R. 1175, it appeared that a young woman, 18 years of age, attended the State Normal College at Ypsilanti during the fall term of 1921 and the winter term of 1922, and was refused readmission for the spring term of 1922. The refusal was based on an investigation of plaintiff's conduct made by the dean of women of the institution, and approved by the president. Before taking the action, the dean called the plaintiff in, fully apprised her of the information which had come to her as dean of women, and gave her ample opportunity to explain her conduct. The plaintiff's counsel in the case contended that she had been expelled without a hearing, but the court held the proceeding above recited was a sufficient hearing under the circumstances.

"In Smith *v.* Board of Education, 182 Ill. App. 342, a student was expelled from high school because of disobedience of a rule forbidding membership in a high school fraternity. The expulsion was made without a formal hearing, and he claimed that for that reason it was unlawful. In holding that no formal notice or hearing was necessary in such a case, the court said:

"'In order to carry out the powers and duties of school directors or board of education of high school districts, no form of trial or hearing is prescribed. The powers are given, the duties are laid down and the board of education is authorized in a reasonable and parliamentary way to investigate charges of disobedience or misconduct, and to suspend or expel any whom they may find guilty of any violation of any of their reasonable and valid rules.'"

In *Koblitz* v. *Western Reserve University,* 21 Ohio Cir. Ct. R. 144, it is said:

> "Custom, again, has established a rule. That rule is so uniform that it has become a rule of law; and, if the plaintiff had a contract with the university, he agreed to abide by that rule of law, and that rule of law is this: That in determining whether a student has been guilty of improper conduct that will tend to demoralize the school, it is not necessary that the professors should go through the formality of a trial. They should give the student whose conduct is being investigated every fair opportunity of showing his innocence. They should be careful in receiving evidence against him; they should weigh it; determine whether it comes from a source freighted with prejudice; determine the likelihood, by all surrounding circumstances, as to who is right, and then act upon it as jurors, with calmness, consideration and fair minds. When they have done this and reached a conclusion, they have done all that the law requires of them to do.
>
> "Upon a consideration of the foregoing authorities we are impelled to the conclusion that to hold to the rule laid down in Commonwealth ex rel., Hill *v.* McCauley, and seemingly approved in Anthony *v.* Syracuse University, would lead to a wholly impractical and unworkable situation. *As above pointed out, the president of the university has no authority to compel the attendance of witnesses at a hearing or to compel them to testify if they were present. To hold that the power of suspension could only be exercised after a hearing had been held, such as is indicated in the cases last referred to, would be to hold that the power was practically ineffective, except where witnesses voluntarily attended and testified. Such a rule would be destructive of the power vested in the president. When the plaintiff was called before the deans' council on January 19, informed of the charges made against her, given opportunity to deny the same, and make a statement in connection therewith, of which privileges she did not avail*

herself, she was accorded a sufficient hearing." (Italics ours.) 81 Mont. 212-216, 263 Pac. 436-7.

By way of comment, it should be noted that *Anthony* v. *Syracuse,* referred to in the above quoted excerpt and strongly relied upon by the petitioners (see p. 29 of petition), was reversed in *Anthony* v. *Syracuse,* 231 N. Y. S. 435, 224 App. Div. 487. The attention of counsel for petitioners was called in the lower court to the fact that this case had been reversed upon appeal but it seems that he persists in undertaking to rely upon it as authority despite its reversal.

In *Vermillion* v. *State, supra,* the Supreme Court of Nebraska used the following language:

> "The statute under which the board is authorized to expel a pupil does not, in terms, provide for any notice, either to the pupil or to the parents, that a hearing is to be had or action taken. It is probably true that in such proceedings the board acts in a quasi judicial manner, but that no trial in the sense of a judicial inquiry is contemplated by the statute is evident. By what process is the attendance of witnesses to be secured, or, if they attend, who is to administer the oath or punish for a refusal to be sworn? What punishment could be inflicted upon those giving false testimony? *The proceeding, in our judgment, is more like the action of an administrative board in making inquiry as to existing facts upon which they are required to act. In doing this they may use their own judgment and pursue any course which, in their opinion, will fully inform them of the facts attending the subject-matter of the inquiry.*" (Italic ours.) 78 Neb. 110, 110 N. W. 737, 15 Ann. Cas. 302.

In *Morrison* v. *Lawrence, supra,* the Supreme Judicial Court of Massachusetts discussed the question as follows:

> "In the present case a hearing was had, and the only objection to it is that the school committee refused to permit pupils of the school to be compelled to give testi-

mony in regard to matters between themselves and the teacher and the plaintiff, although ready to receive testimony from any of them who would testify voluntarily. This was at most an error in regard to the admission of evidence. It may or may not have had an important bearing upon the hearing, but it has not been contended that the committee were acting otherwise than in good faith. Doubtless they believed that a compulsory examination of the pupils in regard to matters which they probably considered confidential would be detrimental to the interests of the school. *The decision in Bishop v. Inhabitants of Rowley does not go so far as to hold that a hearing in regard to the exclusion of a pupil from a school must be conducted with all the formalities of a trial in a court, or that a material mistake, innocently made by a school committee in conducting a hearing, will make his exclusion unlawful. So to hold would be inconsistent with the previous decisions of the court, as well as with some of the language of that case.*" (Italic ours.)

In *Goldstein* v. *University, supra,* the Supreme Court of New York laid down the rule in the following language:

"The offenses having been committed in the immediate presence of the faculty, they were at once examined, and the parties heard. The plaintiff had every opportunity of making any explanation that would exculpate him from the charge of lying, or relieve him from that of bearing false witness against his fellow student. *Our attention has not been called to any law or rule or regulation which required any form or time of notice, or any particular method of trial before the faculty of this university.*" (Italic ours.)

In *Woods* v. *Simpson, supra,* in discussing the right of officials of a school to use discretion in determining the necessity for the separation of certain students from the student body, the Supreme Court of Maryland said:

"We do not mean to pass judgment on the sufficiency of this student declining to answer the question of the

president and the dean as a separate ground for refusing her admittance to her third year; it would not be necessary to do so, even if it were within our province, for we conclude from the testimony that during the student's previous two years, also, she had given the officials some reason to consider the effect of her actions and her attitude on the university and its proper upkeep, and that, on the whole, experience with her did fairly raise a question whether she could be continued in this student body without results which ought to be avoided; and the decision of that question was within the discretion of the officials, and is, in our opinion, not to be interfered with by the courts."

In *White* v. *Portia Law School, supra,* while there is no discussion of the express right of a hearing, the only type of hearing accorded the student in that case was one before the dean of the school where her conduct was related to her and she was given opportunity to explain or justify.

In *Board of Education* v. *Purse, supra,* the expulsion of a child for misconduct of its mother in and about the school was sustained and it is obvious that no sort of hearing could have been heard in this case charging the child with any offense or misconduct.

These respondents respectfully insist that the above authorities demonstrate quite clearly that an informal hearing is entirely sufficient to warrant the expulsion and all that is necessary in such hearing is that the person be apprised of the charge against him or her and be given an opportunity to be heard in his own behalf. The petitioners in the present case were accorded this type of hearing.

We respectfully insist that to require an educational institution to go through the formalities of a trial at law would be productive of such administrative difficulties and hardships as to make the right of expulsion useless and a vain thing. The power to compel the attendance of witnesses and to punish for non-attendance often is withheld from

such institutions and in the absence of that power, we hardly see how a formal hearing could be heard.

In conclusion, the respondents respectfully insist that the petition is without merit and should be denied.

Respectfully submitted,

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This is to certify that I have mailed A. L. Heiskell, Sterick Building, Memphis, Tennessee, copy of this brief.

NAT TIPTON.

APPENDIX.

Code of Tennessee

8989. *When granted.*—The writ of certiorari may be granted whenever authorized by law, and also in all cases where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or adequate remedy.

Code of Tennessee

8990. *For what.*—Certiorari lies: (1) On suggestion of diminution; (2) where no appeal is given; (3) as a substitute for appeal; (4) instead of audita querela; (5) instead of writ of error.

Code of Tennessee

8998. *Supersedeas.*—The clerk shall also issue a writ of supersedeas in all necessary cases, directed to the opposite party, or the officer in whose hands the execution may be, which shall effectually supersede all further proceedings thereon.

Code of Tennessee

9008. *Mode of review of actions of boards or commissions.*—Anyone who may be aggrieved by any final order or judgment of any board or commission functioning under the laws of this state may have said order or judgment reviewed by the courts, where not otherwise specifically provided, in the following manner:

(1) Such party shall, within sixty days from the entry of the order or judgment, file a petition of certiorari in the chancery court of any county in which any one or more of the petitioners, or any one or more of the material defendants reside, or have their principal office, stating briefly the issues involved in the cause, the substance of the order or judgment complained of, of the respects in which the petitioner claims the order or judgment is erroneous, and praying for an accordant review.

(2) The petition shall be addressed to the presiding chancellor and shall name as defendants the particular board or commission, and such other parties of record, if such, as were involved in the hearing before the board or commission, and who do not join as petitioners.

Code of Tennessee

9014. *Hearing.*—At the expiration of ninety days from the filing of said transcript, the cause shall stand for trial, and shall be heard and determined at the earliest practical date, as one having precedence over other litigation, except suits involving state, county or municipal revenue. The hearing shall be on the proof introduced before the board or commission contained in the transcript, and upon such other evidence as either party may desire to introduce; provided, that all proof shall be taken and filed within seventy-five days from the date upon which the transcript was filed, and said period for taking depositions shall not be extended by the court without application made in writing under oath, showing good cause for the extension or continuance. The chancellor shall reduce his findings of fact and conclusions of law to writing and make them parts of the record.

Code of Tennessee

9015. *Appeal.*—Any party dissatisfied with the decree of the court may, upon giving bond as required by law in other chancery causes, appeal to the supreme court, where the cause shall be heard upon the transcript of the record from the chancery court. Said appeal shall be advanced upon the docket of the supreme court as one of such precedence, and heard as promptly as practicable.

Code of Tennessee

9017. *Supersedeas.*—If the order or judgment rendered by such board or commission made the basis of the petition for certiorari shall make any material change in the status of any matter determined therein, the petitioner may, upon reasonable notice to the board or commission and other material defendants, apply to the chancellor, at the time of

filing the said petition, for a supersedeas, and the chancellor, in his discretion, may grant a writ of supersedeas to stay the putting into effect of said order or judgment or any part thereof. No such supersedeas shall be granted until a good and sufficient bond, in an amount to be fixed and approved by the chancellor, shall have been given by the petitioner, conditioned to indemnify the defendants named in the petition from any injury that may result by reason of the granting of said supersedeas.